

1
2
3
4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA

6 * * *

7 JOHN F. KOCIENSKI,

8 Plaintiff(s),

Case No. 2:16-CV-905 JCM (CWH)

ORDER

9 v.

10 NRT TECHNOLOGIES, INC.,

11 Defendant(s).

12
13 Presently before the court is defendant NRT Technologies, Inc.'s motion for summary
14 judgment. (ECF No. 25). Plaintiff Jack Kocienski filed a response (ECF No. 28), to which
15 defendant replied (ECF No. 31).

16 **I. Facts**

17 In July of 2013, plaintiff, with the recommendation of Steven Johnson, defendant's vice
18 president of gaming North America and general manager of defendant's office in Las Vegas,
19 submitted a resume and application to work as an account executive for defendant. (ECF No. 25).
20 In August 2013, Rosa Laricchia, defendant's senior vice president of sales, conducted a phone
21 interview with plaintiff for the position. *Id.* Defendant alleges that plaintiff's application specified
22 that he was 63 years-old when he applied, Johnson's recommendation informed defendant that
23 plaintiff would be coming out of retirement for the position, and the interview included discussion
24 of plaintiff's work experience. *Id.* Plaintiff alleges that during this initial interview, Laricchia¹
25 asked plaintiff if he could close deals at his age. (ECF No. 28).
26
27
28

¹ Laricchia was 53 years old at the time. (ECF No. 25)

1 Laricchia approved defendant's hiring of plaintiff. On August 20, 2013, plaintiff signed
2 defendant's employment agreement. (ECF No. 25). The week of September 23, 2013, Laricchia
3 met plaintiff in person for the first time at the "G2E" trade show in Las Vegas. *Id.* Laricchia next
4 saw plaintiff in November 2013, when he flew to Toronto for sales training. *Id.*

5 At the November training, plaintiff alleges that Laricchia told plaintiff that defendant does
6 not like to hire older people because they could retire in two to three years. (ECF No. 28). Plaintiff
7 also asserts that when leaving that training, he and Laricchia ran into John Dominelli, defendant's
8 president. *Id.* Plaintiff claims that Laricchia told Dominelli² that plaintiff planned on retiring at
9 the end of 2017, to which Dominelli responded, "[I]ook at me. I'm older than you, and I'm going
10 to continue to work until I drop." *Id.*

11 Plaintiff alleges that in November or December of 2013, Dominelli called Johnson and told
12 him, "I think [plaintiff] is too old. We ought to fire him because he's too old." *Id.*

13 Plaintiff claims that beginning in late 2013 or early 2014 and continuing throughout his
14 employment, Laricchia began calling plaintiff "old man." (ECF No. 28). Plaintiff claims that he
15 told Laricchia not to call him that, but that she continued anyway. *Id.* Plaintiff asserts that
16 Laricchia called him "old man" approximately 50 times.³ *Id.* Plaintiff claims he informed Johnson
17 about Laricchia calling him "old man." *Id.* Plaintiff also claims that Johnson called him "old
18 man" and "grumpy old man" approximately 100 times. *Id.*

19 Plaintiff alleges that in the spring of 2014, Laricchia made comments about three other
20 employees being too old for their employment with defendant. (ECF No. 28).

21 Defendants assert that in early December of 2014, Johnson talked with the sales people in
22 defendant's Las Vegas office about a new employment plan ("new plan") that increased the annual
23 base salary for its account executives and would change several job titles, including plaintiff's,
24

25 ² Dominelli was 66 years old at the time. (ECF No. 31)

26 ³ Defendants allege that plaintiff "admitted that (1) he could not name even one person who
27 witnessed Laricchia's comments; (2) he was only able to provide the dates and circumstances
28 concerning Laricchia calling him "old man" twice; (3) he claimed to have to [ld] his friend Johnson
that he did not like being called "old man;" (4) he never told anybody else at NRT that Laricchia
called him "old man;" and (5) he never complained to human resources about Laricchia because
her alleged comments did not affect his ability to conduct his job." (ECF No. 25)

1 from account executive to vice president. (ECF No. 25). At the time, the new plan still needed to
2 be approved and Laricchia still needed to conduct due diligence. *Id.*

3 Less than one week later, Johnson took time off for personal reasons, and Laricchia took
4 over his duties, increasing her workload and requiring her to fly between Toronto and Las Vegas
5 regularly. *Id.* Defendant alleges that, at this time, plaintiff began calling and emailing Laricchia
6 several times per week to see when the new plan would be implemented. *Id.* Laricchia informed
7 plaintiff that she was busy to her increased workload, but reassured him that the new plan “would
8 ultimately be approved, and that even if it was not finalized before the end of the year, it would
9 still be made retroactive to January 1, 2015.” *Id.* Defendant alleges that the frequency of emails
10 increased, and plaintiff became “increasingly angry, aggressive, and confrontational” whenever he
11 spoke with Laricchia about why the new plan had not been instituted yet. *Id.*

12 Defendant claims that around later that month, Laricchia was made aware that plaintiff was
13 being disruptive at work by trying to create dissent among defendant’s sales people because he
14 believed the new plan was being delayed without justification. (ECF No. 25). Defendant alleges
15 that on December 31, 2014, plaintiff sent an email to Johnson and all of the other sales people that
16 “voiced his dissatisfaction with [defendant’s] sales commission payment structure as well as his
17 job title.” *Id.*

18 Plaintiff asserts that every other sales person in the Las Vegas office, except one, called
19 him because they were upset over the new plan being delayed. (ECF No. 28). Plaintiff also claims
20 that employees “were encouraged to voice any and all complaints” based on the defendant’s open
21 door policy. *Id.*

22 On January 5, 2015, Brenda Hopcroft, defendant’s cash management and compliance
23 coordinator, sent plaintiff an e-mail asking him to provide his financial information on a gaming
24 application to the Santa Rosa Rancheria Gaming Commission, the regulatory authority that had
25 jurisdiction over one of plaintiff’s clients. (ECF No. 25). Plaintiff responded that he was not going
26 to disclose his financial information. *Id.* Defendant asserts that Laricchia was forced to step in on
27 Hopcroft’s behalf, but that plaintiff “tersely” refused again. *Id.*

1 Defendant alleges that by mid-January, plaintiff was calling and e-mailing Laricchia so
2 often that she felt harassed. *Id.* On January 19, 2015, Laricchia informed plaintiff that she would
3 discuss his concerns with defendant's human resources director, Renee Chang, and have her call
4 him to talk about the new plan. *Id.* Defendant claims that plaintiff sent Laricchia an e-mail
5 response not to have Cheng call him because it would only "fuel the fire more." *Id.*

6 Defendant claims that on January 22, 2015, plaintiff called Laricchia again regarding the
7 new plan. *Id.* Plaintiff stated again that he was upset that it was not yet instituted. *Id.* Laricchia
8 told him it would be implemented soon and that it would be retroactive, but plaintiff allegedly
9 responded that he no longer trusted Dominelli or Laricchia. *Id.*

10 On January 23, 2015, Laricchia called Dominelli, informed him about plaintiff's conduct,
11 and recommend to Dominelli that defendant terminate plaintiff's employment. *Id.* Dominelli
12 agreed with Laricchia's recommendation and that defendant had no choice but to immediately
13 terminate plaintiff's employment. *Id.*

14 On January 23, 2015, after speaking with Dominelli, Laricchia called plaintiff on the
15 telephone and informed him that his employment with defendant was terminated and to contact
16 defendant's human resources if he had questions. *Id.* Plaintiff claims that when he asked why his
17 employment was being terminated, Laricchia told him that defendant did not need to give him a
18 reason. (ECF No. 28). Plaintiff claims that after his termination, defendant hired Rosario
19 Gonzalez, who was 32 and did not have any experience in the type of sales that defendant handled.
20 *Id.*

21 Plaintiff claims that Laricchia called him "old man" one day prior to his termination. (ECF
22 No. 28). Plaintiff also claims that Dominelli had no issues with plaintiff's sales performance
23 during his employment. *Id.*

24 Plaintiff claims that after he was terminated, defendant failed to pay him all the wages he
25 was due. (ECF No. 28). On July 13, 2015, and August 7, 2015, plaintiff filed wage claims with
26 the labor commissioner. *Id.* Both claims resolved with defendant paying plaintiff in accordance
27 with an order from the labor commissioner. *Id.*

1 On August 13, 2015, plaintiff filed his charge of age discrimination with the Equal
2 Employment Opportunity Commission (“EEOC”). (ECF No. 1). The EEOC issued a notice of
3 suit rights on March 17, 2016. *Id.*

4 **II. Legal Standard**

5 The Federal Rules of Civil Procedure allow summary judgment when the pleadings,
6 depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,
7 show that “there is no genuine dispute as to any material fact and the movant is entitled to a
8 judgment as a matter of law.” Fed. R. Civ. P. 56(a). A principal purpose of summary judgment is
9 “to isolate and dispose of factually unsupported claims.” *Celotex Corp. v. Catrett*, 477 U.S. 317,
10 323–24 (1986).

11 For purposes of summary judgment, disputed factual issues should be construed in favor
12 of the non-moving party. *Lujan v. Nat’l Wildlife Fed.*, 497 U.S. 871, 888 (1990). However, to be
13 entitled to a denial of summary judgment, the nonmoving party must “set forth specific facts
14 showing that there is a genuine issue for trial.” *Id.*

15 In determining summary judgment, a court applies a burden-shifting analysis. The moving
16 party must first satisfy its initial burden. “When the party moving for summary judgment would
17 bear the burden of proof at trial, it must come forward with evidence which would entitle it to a
18 directed verdict if the evidence went uncontroverted at trial. In such a case, the moving party has
19 the initial burden of establishing the absence of a genuine issue of fact on each issue material to
20 its case.” *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000)
21 (citations omitted).

22 By contrast, when the nonmoving party bears the burden of proving the claim or defense,
23 the moving party can meet its burden in two ways: (1) by presenting evidence to negate an essential
24 element of the non-moving party’s case; or (2) by demonstrating that the nonmoving party failed
25 to make a showing sufficient to establish an element essential to that party’s case on which that
26 party will bear the burden of proof at trial. *See Celotex Corp.*, 477 U.S. at 323–24. If the moving
27 party fails to meet its initial burden, summary judgment must be denied and the court need not
28

1 consider the nonmoving party's evidence. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159–
2 60 (1970).

3 If the moving party satisfies its initial burden, the burden then shifts to the opposing party
4 to establish that a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v. Zenith*
5 *Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute, the
6 opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient
7 that “the claimed factual dispute be shown to require a jury or judge to resolve the parties’ differing
8 versions of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626,
9 631 (9th Cir. 1987).

10 In other words, the nonmoving party cannot avoid summary judgment by relying solely on
11 conclusory allegations that are unsupported by factual data. *See Taylor v. List*, 880 F.2d 1040,
12 1045 (9th Cir. 1989). Instead, the opposition must go beyond the assertions and allegations of the
13 pleadings and set forth specific facts by producing competent evidence that shows a genuine issue
14 for trial. *See Celotex*, 477 U.S. at 324.

15 At summary judgment, a court’s function is not to weigh the evidence and determine the
16 truth, but to determine whether there is a genuine issue for trial. *See Anderson v. Liberty Lobby,*
17 *Inc.*, 477 U.S. 242, 249 (1986). The evidence of the nonmovant is “to be believed, and all
18 justifiable inferences are to be drawn in his favor.” *Id.* at 255. But if the evidence of the
19 nonmoving party is merely colorable or is not significantly probative, summary judgment may be
20 granted. *See id.* at 249–50.

21 **III. Discussion**

22 Defendant asserts that summary judgment should be granted in its favor as to plaintiff’s
23 age discrimination claim because plaintiff cannot demonstrate direct or circumstantial evidence
24 that defendant terminated him because of discriminatory animus. (ECF No. 25).

25 Plaintiff alleges that comments made by the people who made the decision to terminate his
26 employment establish evidence of discriminatory animus and that defendant cannot proffer a
27 legitimate, non-discriminatory reason for his termination. (ECF No. 28).

1 The Age Discrimination in Employment Act of 1967 (“ADEA”) makes it unlawful “to
2 discharge any individual . . . because of such individual’s age.” 29 U.S.C. § 623(a)(1). “To
3 establish a disparate-treatment claim under the plain language of the ADEA, therefore, a plaintiff
4 must prove that age was the “but-for” cause of the employer’s adverse decision.” *Gross v. FBL*
5 *Fin. Servs.*, 557 U.S. 167, 176, 129 S. Ct. 2343, 2350 (2009).

6 Courts evaluate ADEA claims that are based on circumstantial evidence of discrimination
7 by using the three-stage burden-shifting framework laid out in *McDonnell Douglas Corp. v. Green*,
8 411 U.S. 792 (1973). *Diaz v. Eagle Produce Ltd. P’ship*, 521 F.3d 1201, 1207 (9th Cir. 2008).
9 Under this framework, the employees must first establish a prima facie case of age discrimination.
10 *Id.*

11 “To establish a prima facie case using circumstantial evidence, the employees must
12 demonstrate that they were (1) members of the protected class (at least age 40); (2) performing
13 their jobs satisfactorily; (3) discharged; and (4) replaced by substantially younger employees with
14 equal or inferior qualifications.” *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1281 (9th Cir.
15 2000).

16 To establish a prima facie case, plaintiffs may also offer evidence that “gives rise to an
17 inference of unlawful discrimination” with direct evidence of discriminatory intent. *Vasquez v.*
18 *Cty. of L.A.*, 349 F.3d 634, 640 (9th Cir. 2003). Direct evidence is “evidence which, if believed,
19 proves the fact [of discriminatory animus] without inference or presumption.” *Id.*

20 If a plaintiff succeeds in establishing a prima facie case of discrimination, the burden shifts
21 to the defendant to offer a legitimate, nondiscriminatory reason for the alleged discriminatory
22 conduct. *McDonnell Douglas Corp.*, 411 U.S. at 802. If a defendant provides a legitimate,
23 nondiscriminatory reason, then the burden shifts back to the plaintiff to demonstrate that the
24 defendants given reason is mere pretext for discrimination. *Id.* at 804.

25 “A plaintiff may demonstrate pretext in either of two ways: (1) directly, by showing that
26 unlawful discrimination more likely than not motivated the employer; or (2) indirectly, by showing
27 that the employer’s proffered explanation is unworthy of credence because it is internally
28 inconsistent or otherwise not believable.” *Braaten v. Newmont USA Ltd.*, No. 3:15-cv-00174-

1 LRH-WGC, 2017 U.S. Dist. LEXIS 19210, at *14 (D. Nev. Feb. 10, 2017) (quoting *Earl v. Nielsen*
2 *Media Research, Inc.*, 658 F.3d 1108, 1112-13 (9th Cir. 2011)). When a plaintiff's offered
3 evidence of pretext is circumstantial, "the plaintiff must produce 'specific' and 'substantial' facts
4 to create a triable issue of pretext." *Id.*

5 *a. Direct evidence*

6 Defendant asserts that if plaintiff attempts to base his discrimination claim upon having
7 direct evidence of discriminatory animus the court should grant summary judgment in favor of
8 defendant because "plaintiff admitted in his deposition that he did not have any facts or evidence
9 to support his belief that he had been terminated because of his age." (ECF No. 25).

10 Plaintiff responds that he has presented direct evidence of discriminatory animus via age-
11 related comments allegedly made by Dominelli and Laricchia, the decision makers in plaintiff's
12 termination. (ECF No. 28).

13 Plaintiff refers to a comment allegedly made by Dominelli in November or December of
14 2013. *Id.* Plaintiff alleges that, shortly after plaintiff was hired, Dominelli told Johnson to fire
15 plaintiff because he was "too old" and did not have enough energy. *Id.* Plaintiff also asserts as
16 direct evidence a series of age-related comments made by Laricchia throughout plaintiff's
17 employment at defendant. *Id.* Plaintiff also refers to one specific comment made by Laricchia in
18 November of 2013, when he claims she asked if plaintiff was too old to do the job. *Id.*

19 Defendant argues that these comments are nothing more than "stray remarks" made over
20 one year prior to plaintiff's termination and, therefore, do not constitute direct evidence. (ECF
21 No. 31).

22 "[S]tray' remarks are insufficient to establish discrimination." *EEOC v. Republic Servs.*,
23 *Inc.*, 640 F. Supp. 2d 1267, 1286 (D. Nev. 2009) (quoting *Merrick v. Farmers Ins. Group*, 892
24 F.2d 1434, 1438 (9th Cir. 1990) (citations omitted)). In *Republic Services, Inc.*, the plaintiff used
25 similar comments to allege direct evidence of age discrimination. 640 F. Supp. 2d at 1286. The
26 court held that "the use of the term "old man" a few times [had] not been connected to [plaintiff's]
27 termination either in conduct or in closeness of time. [The comments were] therefore nothing
28

1 more than stray remarks, which [were] insufficient to constitute direct evidence of age
2 discrimination.” *Id.*

3 Here, plaintiff has not demonstrated direct evidence of discriminatory intent. Dominelli’s
4 alleged November or December of 2013 comment and Laricchia’s alleged November of 2013
5 question occurred over one year prior to plaintiff’s termination. (ECF Nos. 28 & 31). These “stray
6 remarks” do not constitute direct evidence of discriminatory animus. *See Republic Servs., Inc.*,
7 640 F. Supp. 2d at 1286.

8 *b. McDonnell Douglas framework*

9 For the purposes of its motion, defendant concedes that “[p]laintiff 1) was at least forty
10 years old, (2) that he was terminated, (3) that he was qualified for the job from which he was fired,
11 and (4) that he was replaced by a younger employee.” (ECF No. 25). Therefore, conceding in its
12 motion that plaintiff has made a prima facie case of age discrimination, defendant argues that it
13 had a legitimate, nondiscriminatory reason to terminate plaintiff. *Id.* Defendant also asserts that
14 plaintiff cannot provide any evidence that defendant’s asserted reasons are mere pretext. *Id.*

15 Plaintiff claims that he has met his burden under the *McDonnell Douglas* framework to
16 overcome defendant’s summary judgment motion. (ECF No. 28). Plaintiff asserts that he has
17 made a prima facie case of age discrimination and that defendant cannot articulate a legitimate,
18 nondiscriminatory reason for his termination. *Id.*

19 *i. Legitimate, nondiscriminatory reason*

20 Courts have consistently held that they “should not second guess an employer’s exercise
21 of its business judgment in making personnel decisions, as long as they are not discriminatory.”
22 *Republic Servs., Inc.*, 640 F. Supp. 2d at 1313; *see also Brown v. TA Operating LLC*, No. 3:07-
23 CV-308-ECR-VPC, 2010 U.S. Dist. LEXIS 40667, at *16 (D. Nev. Apr. 23, 2010).

24 Defendant asserts that plaintiff’s employment was terminated for the legitimate reason of
25 plaintiff’s insubordination and the following other specific reasons:

26 (1) Plaintiff told Ms. Laricchia that he did not trust her or Mr. Dominelli, who were
27 his bosses; (2) for almost two months, on a weekly basis, Plaintiff continuously
28 harassed, badgered, and criticized Ms. Laricchia about the New Plan, despite her
repeated assurances and promises that it would be approved and implemented
retroactively to January 1, 2015; (3) Plaintiff was repeatedly insubordinate and
condescending towards Ms. Laricchia; (4) Plaintiff repeatedly told Ms. Laricchia
how to do her job; (5) Plaintiff was continually trying to interfere with and sow

1 dissent among NRT's relationships with its other sales personnel; and (6) Plaintiff
2 refused to provide his personal financial information on NRT's application to the
3 Santa Rosa Rancheria Gaming Commission, which Plaintiff knew was a job
4 requirement.
5 (ECF No. 25).

6 The court holds these proffered reasons serve as legitimate, nondiscriminatory business
7 reasons to terminate plaintiff's employment.

8 *ii. Pretext*

9 Because defendant has proffered sufficient, non-discriminatory reasons for plaintiff's
10 termination, plaintiff must establish that defendant's reasons were pretext for his termination and
11 that his age was the "but-for" reason for his termination. *Gross*, 557 U.S. at 176.

12 A plaintiff may "show pretext directly, by showing that discrimination more likely
13 motivated the employer, or indirectly, by showing that the employer's explanation is unworthy of
14 credence." *Vasquez*, 349 F.3d at 641. Where, as here, the plaintiff asserts pretext with support of
15 only circumstantial evidence, "the plaintiff must produce 'specific' and 'substantial' facts to create
16 a triable issue of pretext." *Braaten*, 2017 U.S. Dist. LEXIS 19210, at *14 (quoting *Earl*, 658 F.3d
17 1108, 1112-13).

18 "[W]here the same actor is responsible for both the hiring and the firing of a discrimination
19 plaintiff, and both actions occur within a short period of time, a strong inference arises that there
20 was no discriminatory motive." *Republic Serv., Inc.*, 640 F. Supp. 2d at 1301 (quoting *Bradley v.*
21 *Harcourt, Brace & Co.*, 104 F.3d 267, 270-71 (9th Cir. 1996)); see *Lowe v. J.B. Hunt Transp.,*
22 *Inc.*, 963 F.2d 173 (8th Cir. 1992) (finding argument that defendant developed animus to older
23 people less than two years after hiring member of protected age group "simply incredible");
24 *Buhrmaster v. Overnite Transp. Co.*, 61 F.3d 461, 464 (6th Cir. 1995) ("An individual who is
25 willing to hire and promote a person of a certain class is unlikely to fire them simply because they
26 are a member of that class.").

27 In *McCoy v. Barrick Gold of North America, Inc.*, the court held that:

28 any pretext argument [here] is without merit given the fact that McCoy was first
hired by Barrick when he was 52 years old, and that Olsen, the individual who
ultimately made the decision to terminate McCoy's employment, also made the
decision to promote McCoy to leach pad crew in 2011 when he was 58 years old.

1 No. 3:15-cv-0188-LRH-WGC, 2016 U.S. Dist. LEXIS 132417, at *10 (D. Nev. Sep. 27, 2016).
2 The court further explained that, “[o]n such facts, [defendant] is entitled to a “strong inference”
3 [plaintiff’s] age was not the but-for cause of his termination.” *Id.*

4 Here, because Laricchia was the person who hired plaintiff and the person who terminated
5 plaintiff’s employment, a “strong inference” arises that plaintiff’s age was not the but-for cause of
6 his termination. *See Id.*

7 Plaintiff’s motion addresses some of the specific reasons defendant gave for plaintiff’s
8 termination. Plaintiff argues that if his allegedly abusive behavior to Laricchia was the reason for
9 his termination, that Laricchia would have included it as an explanation in his termination of
10 employment. *Id.* Plaintiff also argues that his refusal to give financial information to the Santa
11 Rosa Rancheria Gaming Commission is not a legitimate reason for termination because Johnson
12 resolved the issue by assigning the client to another employee. *Id.*

13 Plaintiff’s response does not demonstrate that defendant’s proffered reasons for
14 terminating plaintiff were not legitimate and nondiscriminatory. Therefore, plaintiff has not
15 sufficiently demonstrated that those reasons are pretext.

16 **IV. Conclusion**

17 Accordingly,

18 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that defendant’s motion (ECF
19 No. 25) be, and the same hereby is, GRANTED.

20 IT IS FURTHER ORDERED that defendant’s stipulation for extension of time to file a
21 reply in support of its motion for summary judgment (ECF No. 29) be, and the same hereby, is
22 GRANTED.

23 The clerk shall enter judgment accordingly and close the case.

24 DATED March 15, 2018.

25 
26 _____
UNITED STATES DISTRICT JUDGE